

NO. PD-0064-20
IN THE COURT OF CRIMINAL APPEALS FOR
THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/21/2020
DEANA WILLIAMSON, CLERK

NO. 05-19-00034-CR

ON APPEAL FROM THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

JUAN CARLOS FLORES

V.

THE STATE OF TEXAS

Cause No. 069074
In the 15th District Court of
Grayson County, Texas

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

ORAL ARGUMENT REQUESTED

JEROMIE ONEY
Switzer | Oney Attorneys at Law
P.O. Box 2040
Gainesville, Texas 76241
(940) 665-6300
Fax (940) 665-6301
TSBN 24042248

ATTORNEY FOR APPELLANT

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

Pursuant to Tex. R. App. P. 68.4, the State hereby lists all parties to this appeal with the names of all trial and appellate counsel:

Appellant:

Juan Carlos Flores
Appellant

Jeromie Oney
P.O. Box 2040
Gainesville, Texas 76241
(940) 665-6300

Trial and appellate attorney for Appellant

Appellee:

The State of Texas

Matt Rolston
Assistant District Attorney
200 S. Crockett St.
Sherman, Texas 75090
(903) 813-4361

Trial attorney for State

Karla Baugh
Assistant District Attorney
200 S. Crockett St.
Sherman, Texas 75090
(903) 813-4361

Appellate attorney for State

Trial judge:

Hon. Rayburn Nall (sitting by assignment)
Judge, 15th District Court
200 S. Crockett St.
Sherman, Texas 75090
(940) 813-4200 ext. 4303

TABLE OF CONTENTS

Identity of Judge, Parties, and Counsel.....	ii
Index of Authorities.....	iv
Statement Regarding Oral Argument.....	1
Statement of the Case.....	1
Statement of Procedural History.....	1
Question Presented for Review.....	2
The court of appeals erred where it held the evidence to be sufficient to prove the use of a deadly weapon where the alleged weapon was not used in a way that was capable of causing death or serious bodily injury.	
Arguments and Authorities.....	2
Statement of Facts.....	2
Argument.....	4
Prayer.....	7
Certificate of Compliance.....	7
Certificate of Service.....	8
Appendix: Court of Appeals Opinion	

INDEX OF AUTHORITIES

CASES

<i>Flores v. State</i> , 05-19-00034-CR, 2019 WL 6907076.....	2,3
<i>Hernandez v. State</i> , 332 S.W.3d 664 (Tex.App.-Texarkana 2010).....	6
<i>Patterson v. State</i> , 769 S.W.2d 938 (Tex.Crim.App.1989).....	3
<i>Pena Cortez v. State</i> , 732 S.W.2d 713 (Tex.App.-Corpus Christi 1987).....	6
<i>Plummer v. State</i> , 410 S.W.3d 855 (Tex.Crim.App.2013).....	3

STATUTES

TEX. PENAL CODE § 1.07(17).....	4,5
TEX. R. APP. PROC. 66.3(a).....	4

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT REGARDING ORAL ARGUMENT

The Appellant respectfully requests oral argument as an opportunity to discuss the facts of this case will substantially aid the court in disposition of the appeal.

STATEMENT OF THE CASE

The appellant was charged with the offense of possession of Aggravated Robbery. (CR at 12). At trial, the appellant entered a plea of “not guilty.” The appellant was found guilty by the jury. (RR at 101). The trial court sentenced appellant to twenty (15) years confinement TDCJ-ID. (RR at 101). On appeal, the Fifth Court of Appeals affirmed the conviction. This petition followed.

STATEMENT OF PROCEDURAL HISTORY

This petition arises from Cause No.05-19-00034-CR from the Fifth Court of Appeals in Dallas, Texas. On December 19, 2019 the Court of Appeals issued an opinion affirming the appellant’s conviction. No motion for rehearing was filed. Appellant filed a motion for extension of time to file a petition for discretionary review, which this court granted. This petition is due February 19, 2020.

QUESTION PRESENTED FOR REVIEW

The court of appeals erred where it held the evidence to be sufficient to prove the use of a deadly weapon where the alleged weapon was not used in a way that was capable of causing death or serious bodily injury.

ARGUMENTS AND AUTHORITIES

STATEMENT OF FACTS

On September 4, 2017 Nanu Shapakota (“Shapakota”) was working at a convenience store owned by her and her husband. (IV RR at 123, 127). Around 8:30 on that date she was working in the back of the store when an individual came in and asked her to come to the front of the store. The individual’s face was covered and he was holding something she described to be “like” a gun in his hand. (IV RR at 127). The individual told her she had one minute to give him all of the money she had in the register. He put the bag on the counter and Shapakota placed all of the money from the register in the bag. After the individual left, Shapakota called the police. (IV RR at 128).

Shapakota believed the item in the individual’s hand to be a gun up until she later watched the security footage with law enforcement. (IV RR at 128-129). Shapakota stated the individual only held the object as if it were a gun but did not strike at her with it or attempt to hit her. (IV RR at 137). It was later determined the object was a drill covered with sacks. (IV RR at 154).

OPINION BELOW

The court of appeals held the evidence was sufficient to prove the drill was used as a deadly weapon.. *Flores v. State*, 05-19-00034-CR, 2019 WL 6907076 (Tex.App.-Dallas 2019). The court rejected appellant’s argument that it should

review the evidence to determine whether he *actually* used the drill in such a way that it was capable of causing death or serious bodily injury. In doing so, the court cited this court's opinion in *Patterson* stating, "a defendant uses a deadly weapon during the commission of the offense when the weapon is employ or utilized to achieve its purpose. *Id.* citing *Patterson v. State*, 769 S.W.2d 938 (Tex.Crim.App.1989). The court also cited this court's opinion in *Plummer* stating, "use of a deadly weapon refers to the wielding of a firearm with effect, but also extends to any employment of a deadly weapon, even its simple possession, if such possession facilitates the associated felony. *Plummer v. State*, 410 S.W.3d 855, 864, 65 (Tex.Crim.App.2013).

The court below acknowledged the appellant did not use the drill to overly harm Shapakota, but stated he used it for the intimidating value to accomplish the crime. The court held the appellant used and exhibited the drill in such a way that it was capable of causing death or serious bodily injury, and that he used it to facilitate the robbery. Consequently, the court held the record supported the jury's determination the appellant used or exhibited a deadly weapon during the commission of the offense.

ARGUMENT

In holding the evidence of a deadly weapon to be sufficient, the court of appeals has decided an issue that conflicts with another court of appeals' decision. *Tex. R. App. P.* 66.3(a).

The State had the burden at trial to prove the appellant “did then and there, while in the course of committing theft of property and with the intent to obtain or maintain control of said property, intentionally or knowingly threaten to place [victim] in fear of imminent bodily injury or death and the defendant did then and there use or exhibit a deadly weapon, to wit: a drill.” (CR at 12). A deadly weapon is “(A) firearm or anything manifestly designed, made, or adapted for the purpose of inflicting serious bodily injury; (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” TEX PENAL CODE § 1.07(17).

A drill, the alleged weapon in the present case, is not a firearm, nor is it manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury. TEX PENAL CODE § 1.07(17)(A). Additionally, there was no evidence the drill was in any way adapted for the purpose the purpose of inflicting death or serious bodily injury. *Id.* Therefore, for the evidence to be sufficient for the jury to find the drill to be a deadly weapon, it must show that in its use or

intended use it was capable of causing death or serious bodily injury. TEX PENAL CODE § 1.07(17)(B).

The “use” of the drill during the offense consisted of leading the victim to believe it was a firearm. The victim testified she believed the object in the suspect’s hand to be a firearm. (IV RR at 171). When asked by the prosecutor if she would still be afraid knowing it was a drill she responded that “it can poke, he can turn it on me.” (IV RR at 133). When asked specifically if the suspect struck her with the drill or attempted to strike her with it, she responded in the negative. (IV RR at 137). When asked at trial how a drill could be a deadly weapon, the investigator testified “you could use it as a blunt object,. You could hit somebody with it. You could stat somebody with it. You could drill them with it.” (V RR at 48).

The appellant argued at the court below the possibility the drill *could* be used in a way that might cause death or serious bodily injury is not sufficient to show the drill *was* used in a way that could cause death or serious bodily injury. The court rejected this argument, stating use of a deadly weapon extends to any employment of a deadly weapon; even its simple possession facilitates the associated felony. This holding, however, assumes the object in question is, in fact, a deadly weapon without showing how the record supports it meets the statutory definition of a deadly weapon.

Courts in other jurisdictions have held that, under facts similar to those in the present case, the evidence was insufficient to support a deadly weapon finding. The Texarkana court of appeals held an aggravated kidnapping case in *Hernandez* the evidence to be insufficient where a toy gun was used (and believed to be real by the victim) and only pointed at the victim, but did not strike the victim or attempt to strike her. *Hernandez v State*, 332 S.W.3d 664 (Tex.App.-Texarkana 2010). In *Pena*, the Corpus Christ court of appeals held the evidence was insufficient where a toy gun was used and its manner of use was not capable of actually causing death or serious bodily injury. Here, as in *Hernandez* and *Pena* the alleged deadly weapon was used in such a way it could not *actually* cause death or serious bodily injury. *Pena Cortez v. State*, 732 S.W.2d 713 (Tex.App.-Corpus Christi 1987). In deciding the evidence was sufficient the court of appeals decided the issue in a way that conflicts with other court of appeals' decisions. *Tex. R. App. P.* 66.3(a).

This Court should grant review.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the Court grant this Petition for Discretionary Review, grant oral argument, and reverse the court of appeals.

Appellant prays for any such further relief to which he may be entitled.

Respectfully submitted,

Switzer | Oney Attorneys at Law, PLLC

/s/ Jeromie Oney

Jeromie Oney
P.O. Box 2040
Gainesville, Texas 76241
(940) 665-6300
FAX (940) 665-6301
TSBN 24042248

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLAANCE

This petition complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this brief, the undersigned attorney certifies that this brief contains 1,348 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

/s/ Jeromie Oney

Jeromie Oney

CERTIFICATE OF SERVICE

I do hereby certify that on the 20th day of February, 2020 a copy of the Appellant's Petition for Discretionary Review was served to:

Karla Hackett-Baugh
Assistant District Attorney
baughk@co.grayson.tx.us

Stacey M. Soule
State Prosecuting Attorney
information@spa.texas.gov

/s/ Jeromie Oney

Jeromie Oney



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00034-CR

**JUAN CARLOS FLORES, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 15th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 069074**

MEMORANDUM OPINION

**Before Justices Bridges, Whitehill, and Nowell
Opinion by Justice Bridges**

A jury convicted appellant Juan Carlos Flores of aggravated robbery, and the trial court sentenced him to fifteen years' imprisonment. He raises two issues on appeal. First, he argues the evidence is legally insufficient to establish he used or exhibited a deadly weapon during the robbery. In his second issue, he contends the trial court erred by denying his motion to suppress after an illegal search of his home. We affirm.

Background

On September 4, 2017, Nanu Shapakota was working at a convenience store she owned with her husband. Around 8:30 p.m., she heard someone enter. She turned around and saw a man with his face covered holding what she thought was a gun. Shapakota was scared and started shaking. The man told her she had one minute to put all the money from the register in a bag. She

felt threatened and was afraid he would hurt her if she failed to comply. She immediately pulled all the money from the register and put it in the bag. The man then ordered her to the restroom so he could leave. She obeyed, appellant left, and she immediately called 911.

Sergeant Brian Conrad responded to the call. He watched the surveillance video and noted appellant arrived and left the store in a silver Tahoe. From the video, it was determined the “gun” was a drill wrapped in plastic bags.

The police released the surveillance video on Facebook. Three people saw the video, recognized appellant, and called police. Officer Kyle Mackay returned the call and gathered information, which included an address. Officer Mackay went to the address provided. When he pulled up, he immediately saw a silver Tahoe. Based on the surveillance video, he believed it was the same vehicle. Officer Mackay knocked on the front door and appellant’s wife, Isabel Flores, answered. She said appellant was at work. She gave consent to search the Tahoe, but Officer Mackay did not recover any evidence. He left his card with Isabel and instructions for appellant to call him.

After a few days passed and appellant did not call, Officer Mackay returned to the home. Isabel said appellant left for Florida, but she invited Officer Mackay inside the home. Inside a bedroom, Officer Mackay saw a cordless drill with a long bit attached sitting on a bookshelf in plain view. Next to the bookshelf on the ground was a ripped plastic bag matching the color of the bag in the surveillance video. He also noticed a plastic bag on the floor of the open closet. Officer Mackay believed the drill and plastic bags related to the robbery. He seized the evidence.

Appellant was arrested for aggravated robbery. He filed a motion to suppress, which the trial court denied. The case proceeded to trial, and the jury convicted him. This appeal followed.

Sufficiency of the Evidence

In his first issue, appellant contends the evidence is insufficient to show he used or exhibited a deadly weapon during the robbery. As charged in this case, a person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, appellant intentionally or knowingly threatened or placed complainant in fear of imminent bodily injury or death. *See* TEX. PENAL CODE ANN. § 29.02(a)(2). A person commits aggravated robbery if he commits robbery, and the State proves an aggravating factor. *Sweed v. State*, 351 S.W.3d 63, 69 (Tex. Crim. App. 2011). In this case, the aggravating factor was the use or exhibition of a deadly weapon: a drill. *See* TEX. PENAL CODE ANN. § 29.03(a)(2). “Deadly weapon” means “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” *Id.* § 1.07(a)(17)(B). “Use” means the deadly weapon was employed, utilized, or applied in order to achieve its intended result, the commission of a felony. *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989) (en banc). “Exhibited” means the weapon was consciously shown or displayed during the commission of the offense. *Id.* The court of criminal appeals requires a two-step process in determining whether a “deadly weapon” was “used or exhibited.” *See McCain v. State*, 22 S.W.3d 497, 502–03 (Tex. Crim. App. 2000) (en banc) (first analyze whether object could be a deadly weapon and if so, then determine whether the deadly weapon was “used” or “exhibited” during the offense).

When reviewing sufficiency of the evidence, we consider all of the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a factfinder was rationally justified in finding guilt beyond a reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *see Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). The factfinder is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Temple*, 390 S.W.3d at 360.

Appellant does not dispute that a drill is capable of causing death or serious bodily injury, but rather argues that under these facts, the evidence is insufficient to find the drill “in its use or intended use was capable of causing death or serious bodily injury.” He asserts that whether the drill *could* have been used to strike or puncture Shapakota is not the relevant inquiry. Instead, he contends we should review the evidence to determine whether appellant *actually* used the drill in such a way that it was capable of causing death or serious bodily injury. Because appellant pointed the drill like a gun, but did not strike Shapakota or raise the drill as if to strike, he argues no evidence exists to support the aggravating element.

We reject appellant’s argument. A defendant uses a deadly weapon during the commission of the offense when the weapon is employed or utilized to achieve its purpose. *Patterson v. State*, 769 S.W.2d at 941. Use of a deadly weapon refers to the wielding of a firearm with effect, but also extends to any employment of a deadly weapon, even its simple possession, if such possession facilitates the associated felony. *Plummer v. State*, 410 S.W.3d 855, 864–65 (Tex. Crim. App. 2013); *Patterson*, 769 S.W.2d at 941. To exhibit a deadly weapon, the weapon need only be consciously displayed during the commission of the offense. *Patterson*, 769 S.W.2d at 941. In the context of violent offenses, if a person exhibits a deadly weapon, without overtly using it to harm or threaten while committing a felony, the deadly weapon still provides intimidation value that assists the commission of the felony. *Plummer*, 410 S.W.3d at 862.

Here, although appellant did not use the drill to overtly harm Shapakota, he certainly used it for intimidation value to accomplish the crime. Shapakota testified appellant held and pointed the drill at her like a gun. She was afraid appellant was going to use it to hurt her. The jury watched the surveillance video in which his threat is audible and the weapon is visible. Sergeant Conrad testified a drill is a deadly weapon because the sheer weight could bludgeon someone to death or a drill bit could stab someone. Thus, appellant used and exhibited the drill in such a way

that it was capable of causing death or serious bodily injury, and he used it to facilitate the robbery. *See Plummer*, 410 S.W.3d at 865 (deadly weapon finding must contain some facilitation connection between the weapon and the felony); *see also Adame v. State*, 69 S.W.3d 581, 582 (Tex. Crim. App. 2002) (“In proving use of a deadly weapon other than a deadly weapon per se, the State need show only that the weapon used was capable of causing serious bodily injury or death in its use or *intended use*.”) (emphasis added).

We review the record to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that appellant used or exhibited a deadly weapon during commission of the offense. *See Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003); *Cervantes v. State*, No. 05-16-00425-CR, 2017 WL 1164589, at *2 (Tex. App.—Dallas Mar. 29, 2017, no pet.). The record supports the jury’s determination. We overrule appellant’s first issue.

Motion to Suppress

In his second issue, appellant argues the trial court erred by denying his motion to suppress evidence after an illegal search of his home. The State responds evidence was legally seized in plain view.

We review a trial court’s suppression ruling under an abuse-of-discretion standard. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996) (en banc). At a suppression hearing, the trial judge is the sole fact-finder. *Arnold v. State*, 873 S.W.2d 27, 34 (Tex. Crim. App. 1993). We give almost total deference to a trial court’s rulings on questions of historical fact and application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor, but we review de novo application-of-law-to-fact questions that do not turn on credibility and demeanor. *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005).

When inside a house, officers may seize evidentiary items found in plain view if (1) the initial intrusion was proper, and (2) it was immediately apparent to the officer that he had evidence before him. *See Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012); *see also Beaver v. State*, 106 S.W.3d 243, 249 (Tex. App.—Houston [1st Dist.] 2003, pet. ref’d). “Immediately apparent” means simply that the viewing officers must have probable cause to believe an item in plain view is contraband before seizing it. *State v. Dobbs*, 323 S.W.3d 184, 189 (Tex. Crim. App. 2010). Probable cause exists where the facts available to the officer would warrant a man of reasonable caution to believe that certain items may be contraband. *Tex. v. Brown*, 460 U.S. 730, 742 (1983). “[I]t does not demand any showing that such a belief be correct or more likely true than false.” *Id.*

Appellant has not challenged whether Officer Mackay was properly inside the home, but instead, focuses on the second prong—whether it was immediately apparent the drill and plastic bags were evidence. Officer Mackay was the only witness to testify at the suppression hearing. He explained the responding officers determined appellant used a power drill, wrapped in plastic, with a bit attached to the end during the robbery. Officer Mackay reviewed the surveillance video and agreed with the responding officers’ assessment of the weapon.

Officer Mackay testified that when Isabel allowed him into the home without a search warrant, his purpose was to look for appellant and “anything involved with the crime, or that was in the scope of plain view.” He saw a drill in plain view on a shelf in a bedroom. He also saw two plastic bags—one on the floor of the bedroom near the shelf and the other on the floor of the open closet. He believed the items could have been used in the robbery based on what he observed in the surveillance video and what responding officers described. When defense counsel asked him on cross-examination if he immediately recognized the items as potential evidence, he answered yes. He testified he did not exceed the scope of Isabel’s consent to search because she voluntarily

invited him into the home. He entered the bedroom looking for appellant. Inside the bedroom, he saw the drill and bags in plain view. He did not move, inspect, or manipulate the items. *See, e.g., Foreman v. State*, 561 S.W.3d 218, 241 (Tex. App.—Houston [14th Dist.] 2018, pet. granted) (“If an officer must manipulate, move, or inspect an object to determine whether it is associated with criminal activity, then the ‘incriminating character’ of the object could not be said to be immediately apparent.”).

Although Officer Mackay testified he “believed” the items were evidence or “potential” evidence, we cannot conclude the trial court abused its discretion by denying the motion to suppress. At the conclusion of the hearing, the trial court stated the following:

All right. Well, I think in light of the fact that he already had seen the video and the fact that the drill and the sacks he saw basically at the same time, I’m going to deny the motion.

I think if it was just a drill and he hadn’t seen the video, or if it was just the sacks by themselves, maybe not. I’ll admit this is different than just seeing a gun sitting here or drugs.

But, I think in light of the chronology of things, he basically saw those things together before he seized them. So, I’m going to deny the motion. I think he immediately knew what it was and he clearly had consent to be where he was.

We must give almost total deference to the trial court’s rulings on questions of historical fact and application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Estrada*, 154 S.W.3d at 607. The evidence supports the trial court’s implied finding that Officer Mackay had probable cause to associate the drill and plastic bags seen in plain view with criminal activity. Accordingly, the trial court did not abuse its discretion by denying appellant’s motion to suppress. Appellant’s second issue is overruled.

Conclusion

Having overruled both of appellant's issues, we affirm the trial court's judgment.

/David L. Bridges/

DAVID L. BRIDGES
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
190034F.U05



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

JUAN CARLOS FLORES, Appellant

No. 05-19-00034-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 15th Judicial District
Court, Grayson County, Texas
Trial Court Cause No. 069074.
Opinion delivered by Justice Bridges.
Justices Whitehill and Nowell participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 19, 2019